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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SEATRAIN LINES, INC., PACIFIC FAR EAST LINES, INC., and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR R. J. REYNOLDS TOBACCO COMPANY AS *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE

LAWRENCE E. WALSH
Attorney for Amicus Curiae
1 Chase Manhattan Plaza
New York, New York 10005
212 422-3400

WILLIAM F. RAGAN
GUY MILLER STRUVE
Of Counsel

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

R. J. Reynolds Tobacco Company hereby respectfully moves pursuant to Supreme Court Rule 42(3) for leave to file the annexed brief as *amicus curiae*. Counsel for petitioner Federal Maritime Commission and counsel for respondents United States of America and Pacific Far East Lines, Inc. have consented to the filing of this brief. The consent of counsel for respondent Seatrain Lines, Inc. was requested but refused.

The Court of Appeals held in the present case that the FMC is without jurisdiction under Section 15 of the Ship-

ping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, over a totally concluded acquisition by one common carrier by water of the assets of another. The Court of Appeals distinguished the question whether the FMC would have jurisdiction over an acquisition which is subject to the continuing supervision, modification, and approval of the FMC under Section 15.

R. J. Reynolds Tobacco Company is a party to such a defeasible ongoing acquisition under which Reynolds, which already owns one common carrier by water, Sea-Land Service, Inc., would acquire a second common carrier by water, United States Lines, Inc., to be operated by Reynolds as a continuing entity distinct from Sea-Land with their relationship subject to the ongoing supervision of the FMC. After extensive hearings the FMC has announced its intention to approve this agreement, but its jurisdiction to do so is the subject of a pending petition for a writ of certiorari, *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157.

R. J. Reynolds Tobacco Company submits the annexed brief as *amicus curiae* to demonstrate (1) that this Court in the present case need not decide the question of the FMC's jurisdiction over ongoing conditional acquisitions, because the holding under review was expressly limited to a totally concluded acquisition, and (2) alternatively, that the FMC has jurisdiction over ongoing conditional acquisitions. There is reason to believe that these considerations will not be adequately presented by the parties because no party has an interest in establishing the distinction between a totally concluded asset acquisition and one which con-

tinues the existence of the acquired company under the protection of FMC supervision and other ongoing conditions. Accordingly, R. J. Reynolds Tobacco Company respectfully requests leave to file the annexed brief as *amicus curiae*.

Dated: New York, New York
January 25, 1973

/s/ LAWRENCE E. WALSH
LAWRENCE E. WALSH
Attorney for Amicus Curiae

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR R. J. REYNOLDS TOBACCO COMPANY AS *AMICUS CURIAE*

In the decision under review, the United States Court of Appeals for the District of Columbia Circuit held that Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, denies the Federal Maritime Commission jurisdiction over a totally concluded acquisition of the assets of one common carrier by water by another. The Court of Appeals made clear that its holding did not encompass acquisitions which create an ongoing relationship subject to continuing supervision and modification by the FMC. R. J. Reynolds Tobacco Company is a party to such an ongoing conditional acquisition under which Reynolds, which already owns one common carrier by

water, Sea-Land Service, Inc., would acquire a second common carrier by water, United States Lines, Inc., to be operated by Reynolds as a continuing entity distinct from Sea-Land with their relationship subject to the ongoing supervision of the FMC. After extensive hearings the FMC has announced its intention to approve this agreement, but its jurisdiction to do so is the subject of a pending petition for a writ of certiorari, *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157.

Although the holding of the Court of Appeals in the decision now under review was limited to bare assets acquisitions between noncompeting carriers with no continuing elements, the FMC's petition for certiorari may be construed as raising the much broader question whether *any* acquisition, ongoing or not, is within the jurisdiction of the FMC under Section 15. R. J. Reynolds Tobacco Company submits this brief as *amicus curiae* to demonstrate that (1) this Court in the present case need not pass on the question of the FMC's jurisdiction over ongoing conditional acquisitions, because the holding of the Court of Appeals was expressly limited to bare assets acquisitions, and (2) if the Court reaches the question of the FMC's jurisdiction over ongoing conditional acquisitions, the Court should hold such acquisitions to be within the FMC's jurisdiction.

Question Presented

The question in *Seatrain* is whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, over a concluded acquisition by one common carrier by water of the assets of another.

The Court of Appeals expressly avoided the question whether the FMC would have jurisdiction over the acquisition of a competing carrier where that acquisition gives rise to an ongoing relationship requiring the continuing supervision of the FMC under Section 15 and the continuing separate existence and operation of the acquired carrier. We submit that this Court need not reach this question in the present case, because this question is squarely presented by the pending petition in *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157. If the question is reached, it should be answered in the affirmative.

Statute Involved

Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814, is set forth in full in the Appendix hereto (11a-13a), and reads in pertinent part as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part,
>
> [1] fixing or regulating transportation rates or fares;
>
> [2] giving or receiving special rates, accommodations, or other special privileges or advantages;
>
> [3] controlling, regulating, preventing, or destroying competition;

[4] pooling or apportioning earnings, losses, or traffic;

[5] allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

[6] limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

[7] or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and

equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

. . . ."

Interest of *Amicus Curiae*

Sea-Land, a subsidiary of Reynolds, and U.S. Lines are major common carriers by water competing in United States foreign and domestic commerce. On November 9, 1970 Reynolds entered into an Agreement with Walter Kidde & Company, Inc., the owner of U.S. Lines, under which U.S. Lines would become a wholly owned subsidiary of Reynolds.* The Agreement, by its terms, was not to become effective until it had been approved by both the Federal Maritime Commission and the Interstate Commerce Commission, and it was immediately filed with both Commissions for approval.

On December 16, 1970 the FMC ordered a hearing on the proposed acquisition, Dkt. No. 70-51, which became the longest hearing ever held by the FMC. Ten groups of parties were separately represented, in addition to the

---

* This Agreement was preceded by a Charter Agreement dated October 27, 1969 under which Sea-Land would have chartered U.S. Lines' sixteen containerships and leased supporting container equipment for twenty years, with an option to purchase at the end of that period. The FMC held a hearing on the Charter Agreement, Dkt. No. 69-56, and the hearing examiner rendered an initial decision on July 28, 1970 holding that the FMC had jurisdiction of the Charter Agreement and that it should be approved. At this point, because of Kidde's need to be relieved without delay of the financial burden of U.S. Lines, it became necessary to enter into the Agreement.

Department of Justice and the FMC.* All issues, including jurisdiction and the impact upon competition of the proposed common ownership of Sea-Land and U.S. Lines by Reynolds, were thoroughly explored. On October 21, 1971 the hearing examiner filed an initial decision holding that the proposed acquisition was subject to the FMC's jurisdiction but recommending that it be disapproved upon competitive grounds.

After two days of oral argument before the full Commission, the FMC held in a preliminary opinion and order served June 7, 1972 (Appendix, 1a-7a) that it had jurisdiction over the proposed acquisition of U.S. Lines and that it was prepared to approve the acquisition upon detailed conditions requiring the independent operation of U.S. Lines and Sea-Land and providing for continuing FMC supervision of their relationship (1a-3a). Balancing competitive considerations against the national interest in meeting foreign containership competition and the public interest in improved ocean transportation, the FMC approved the acquisition in the interest of "stronger U.S.-flag competition in international maritime markets" (2a). The FMC stressed that it intends Sea-Land and U.S. Lines to be "two independent companies to be operated under a continuing Sec. 15 agreement", and retained jurisdiction to modify or cancel its approval at any time (2a, 6a).

After obtaining comments from all parties, the FMC issued news releases on September 28 and 29, 1972 (Appendix, 8a-10a) announcing that it had approved the pro-

* The Department of Justice, FMC Hearing Counsel, and three groups of competitors of Sea-Land and U.S. Lines opposed the Agreement. The Maritime Administration and the Department of Transportation also took part in the proceeding.

posed acquisition subject to issuance of its final opinion and order. The FMC's final opinion and order giving the detailed grounds for its approval is expected to be issued shortly.

On December 15, 1970, while the petition for approval of the Agreement was pending before the FMC, the United States commenced a civil antitrust action in the United States District Court for the District of New Jersey to enjoin the proposed acquisition of U.S. Lines by Reynolds. On April 7, 1971 the District Court held that the FMC lacked jurisdiction under Section 15 of the Shipping Act over the acquisition in the form then proposed. *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971). Reynolds and the other parties to the Agreement filed a petition for an extraordinary writ of certiorari to review the District Court's decision, on the ground that the FMC has jurisdiction over the Agreement and on the further ground that the FMC has primary jurisdiction to pass on its own jurisdiction. *R. J. Reynolds Tobacco Co. et al.* v. *United States and FMC*, No. 71-157. This petition is still pending.

Thus the interest of Reynolds in the issue of the FMC's jurisdiction over acquisition agreements which create an ongoing relationship between common carriers by water is direct and vital, because the proposed acquisition of U.S. Lines by Reynolds, which already owns Sea-Land, would create just such an ongoing relationship. The issue is likewise one of great public importance in light of the FMC's finding that the acquisition of U.S. Lines by Reynolds is necessary to maintain the U.S.-flag position in ocean shipping (1a-2a).

Statement

The Reynolds-U.S. Lines transaction differs fundamentally from that in the present case as described in the opinion of the Court of Appeals (460 F.2d 932). The present case involves the sale of all of the assets of Oceanic Steamship Company to Pacific Far East Lines, Inc.; although Oceanic retains its corporate existence, it does so only as a corporate shell (460 F.2d at 933). There had been no competition between Oceanic and PFEL. There is to be absolutely no continuing restriction or relationship of any kind between Oceanic and PFEL, and the FMC imposed no ongoing conditions on the transaction (460 F.2d at 933). Thus the Oceanic-PFEL transaction involved in the present case, unlike the Reynolds-U.S. Lines transaction, was fully concluded when the sale was closed, and involved no continuing elements subject to ongoing FMC supervision. The Court of Appeals stressed this fact again and again (460 F.2d at 935, 940-41, 945-46).

In the Reynolds-U.S. Lines transaction, both Sea-Land and U.S. Lines will continue to operate independently of each other although both will be subsidiaries of Reynolds (2a). Sea-Land and U.S. Lines will continue in competition under the ongoing supervision of the FMC, coupled with conditions imposed by the FMC to insure their independence (4a-6a). In addition to its power under Section 15 to cancel or modify the Agreement, the FMC has expressly stated that it will retain full jurisdiction to cancel or modify the terms and conditions of its approval of the Reynolds-U.S. Lines transaction (6a).

The extremely lengthy hearing held by the FMC in the Reynolds-U.S. Lines proceeding, and its weighing of anti-

trust considerations against the public interest in the most effective possible utilization of U.S. Lines' containerships, also makes inapplicable the conclusion of the Court of Appeals that the FMC cannot be trusted to balance anti-trust and public interest considerations because it held no hearing in the present case (460 F.2d at 948).

Summary of Argument

Acquisitions which create an ongoing relationship between common carriers by water, either by a cooperative working relationship and common ownership as in the Reynolds-U.S. Lines transaction or by a continuing covenant not to compete or other ongoing obligations, are within the jurisdiction of the Federal Maritime Commission under Section 15 of the Shipping Act.

1. Ongoing conditional acquisition agreements are brought within the FMC's jurisdiction by the plain terms of Section 15 of the Shipping Act. Such acquisition agreements are agreements "controlling, regulating, preventing, or destroying competition" within clause [3] of Section 15. They are also agreements "providing for an exclusive, preferential, or cooperative working arrangement" within clause [7].

2. The FMC has consistently held that it has Section 15 jurisdiction over ongoing conditional acquisition agreements, and Congress has amended and reenacted Section 15 with full knowledge of the FMC's position. This position was supported by the decision of the Ninth Circuit in *Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968). There is no judicial decision expressing doubt as to the

jurisdiction of the FMC except the decision under review and the decision in *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971), as to which a petition for certiorari is pending. The decision under review expressly distinguishes ongoing conditional acquisitions. The decision in *Reynolds* assumed that there were no ongoing elements, ignoring the power of the FMC to modify the Agreement and impose ongoing conditions.

3. The legislative history of the Shipping Act of 1916 shows that Congress was concerned with the common ownership of competing common carriers by water through acquisition, and confirms that it intended to subject acquisitions leading to such common ownership to the FMC's regulatory jurisdiction.

4. The Shipping Act was designed to place ocean shipping under the expert regulatory jurisdiction of a specialized administrative body. This policy obviously supports the FMC's jurisdiction over ongoing conditional acquisitions. The FMC is peculiarly well fitted to deal with such acquisitions because of its expertness and because of its continuing powers of supervision and modification of approved agreements under Section 15.

ARGUMENT

Section 15 of the Shipping Act of 1916 Confers on the Federal Maritime Commission Jurisdiction Over Acquisitions Which Create an Ongoing Relationship Between Common Carriers by Water.

1. The Plain Meaning of the Language of Section 15 Embraces Ongoing Conditional Acquisitions.

Section 15 of the Shipping Act, by its plain terms, clearly embraces at least those acquisitions which create an ongoing relationship between common carriers by water, either by a cooperative working relationship and common ownership as in the Reynolds-U.S. Lines transaction, or by a continuing covenant not to compete or other ongoing obligations. Such an agreement between competitors is an agreement "controlling, regulating, preventing, or destroying competition" which is covered by clause [3] of Section 15. Both the FMC and the Ninth Circuit have found this plain. *See Matson Nav. Co.* v. *FMC*, 405 F.2d 796, 799-800 (9th Cir. 1968); *Agreement No. 8555 Between Isbrandtsen S.S. Co. Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc.*, 7 F.M.C. 125, 128 & n.5 (1962). Even the Court of Appeals in the present case conceded that any asset acquisition "may at first impression be thought to fall within the third category" (460 F.2d at 934).

The Court of Appeals held, however, that asset acquisitions which do not create an ongoing operating relationship are not within Section 15 because it viewed the first six clauses of Section 15, including clause [3], as limited by clause [7], which deals with agreements "in any manner providing for an exclusive, preferential, or cooperative working arrangement" (460 F.2d at 934-35). We believe that this holding was erroneous, because it would reduce the first six clauses of Section 15 to mere surplusage, and be-

cause it disregards this Court's express holding that Section 15 "uses expansive language" and should be construed broadly so as to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." *Volkswagenwerk A.G.* v. *FMC*, 390 U.S. 261, 273-76 (1968).* Nevertheless, even if the Court of Appeals were correct in holding that clause [7] limits the other six clauses of Section 15, an ongoing conditional acquisition agreement like the Reynolds-U.S. Lines transaction, establishing a relationship between two common carriers by water, would still be within Section 15 because it is also "an exclusive, preferential, or cooperative working arrangement" covered by clause [7]. The Court of Appeals in the present case appeared to recognize this (460 F.2d at 935, 945-46).**

2. The FMC and the Courts Have Held Without Exception That Ongoing Conditional Acquisitions Are Within Section 15.

As the Court of Appeals recognized in its extensive discussion of earlier decisions (460 F.2d at 943-45), the FMC and its predecessors have consistently held that they have jurisdiction under Section 15 to approve or disapprove

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* Indeed, in *Volkswagenwerk* this Court rejected the FMC's contention that Section 15 covers only horizontal agreements among direct competitors for an exactly analogous reason: this restrictive interpretation would have limited Section 15 to the agreements covered by clause [3], and would have made all six of the remaining clauses superfluous. 390 U.S. at 275 & n.23.

** The Department of Justice, in its brief to the Court of Appeals, described as follows the "cooperative working arrangements" which it concedes are within the FMC's jurisdiction under Section 15: "They are [(1)] terminable, [(2)] susceptible of modification in the case of changed conditions, and [(3)] do not eliminate all competition between the parties." (P. 8.) All three of these statements are true of ongoing conditional acquisitions. In particular, all three are true of the Reynolds-U.S. Lines transaction.

acquisitions which create an ongoing relationship between common carriers. *See, e.g., Agreement No. 9810, Stock Purchase Agreement Between Prudential Lines, Inc. and W. R. Grace & Co.*, 13 F.M.C. 156 (1969) (purchase by one ocean carrier of stock of another); *Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 F.M.C. 53 (1967) (3-2), *rev'd on other grounds sub nom. Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968) (2-1) (merger of ocean carriers with continuing separate division or subsidiary); *Agreements 8745 and 8745-1, Purchase of Vessels "Alicia" and "Dorothy"*, 7 F.M.C. 199 (1962) (purchase of ships with covenant not to compete); *Agreement No. 8555 Between Isbrandtsen S.S. Co., Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc.*, 7 F.M.C. 125 (1962) (purchase of all the ships of an ocean carrier with covenant not to compete); *Agreements 788, 796, 798, Associated-Banning Co.* v. *Matson Nav. Co.*, 5 F.M.B. 336 (1957) (formation of joint venture); *New York and Porto Rico S.S. Co.-Waterman S.S. Corp. Agreement*, 2 U.S.M.C. 453 (1940) (purchase of "good will" with covenant not to compete).

The FMC's position that it has such jurisdiction has been consistently and clearly communicated to Congress since as early as 1949.* Congress, although it amended and re-

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* *See, e.g., Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.*, 11 F.M.C. 53, 64 n.10 (1967), *rev'd on other grounds sub nom. Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968) (setting forth 1949 FMC letter to Congress); Hearings on S. 3341 Before the Antitrust Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 546-47 (1956); Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on the Progress Report of the Federal Maritime Commission, 87th Cong., 2d Sess. 19-23 (1962).

enacted Section 15 in 1961 and 1964, 75 Stat. 763 (1961), 78 Stat. 148 (1964), has not attempted to alter the FMC's unbroken holding that Section 15 gives it jurisdiction over acquisitions in ocean shipping. The 1961 amendment was in large part an outgrowth of the comprehensive Celler Report on the ocean freight industry,* which expressly noted that the FMB had passed on the American Export-Isbrandtsen acquisition under Section 15. Report of the Antitrust Subcommittee of the House Judiciary Committee on the Ocean Freight Industry, 87th Cong., 2d Sess. 47-48 (1962). Similarly, the 1964 amendment affirmatively shows a congressional understanding that Section 15 covers long-term facilities agreements closely analogous to ongoing conditional acquisitions.**

The Ninth Circuit upheld the FMC's jurisdiction over an ongoing merger transaction in *Matson Nav. Co.* v. *FMC*, 405 F.2d 796 (9th Cir. 1968). No court has held the FMC to be without jurisdiction over an ongoing conditional acquisition. The Court of Appeals in the present case, although it held that the FMC lacked jurisdiction over a bare assets acquisition, indicated that it believed that the FMC has jurisdiction over acquisitions which create an ongoing relationship by saying:

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* S. Rep. No. 860, 87th Cong., 1st Sess. 10 (1961).

** The FMC in a number of decisions has exercised jurisdiction over agreements pursuant to which terminals and other port facilities are constructed in reliance upon the long-term commitment of a carrier to use them. *See, e.g., Agreement No. T-4: Terminal Lease Agreement at Long Beach, California*, 8 F.M.C. 521 (1965). This Court cited these decisions with approval in *Volkswagenwerk A.G.* v. *FMC*, 390 U.S. 261, 274 (1968). The 1964 amendment to Section 15, 78 Stat. 148 (1964), whose purpose was to avert retrospective penalties based on these decisions, *see* H.R. Rep. No. 1126, 88th Cong., 2d Sess. (1964), reflects congressional acceptance of the decisions themselves.

> "We recognize that there is a certain apparent inconsistency (more apparent than real) in holding that the parties are not required to file with the Commission and the Commission is not required to approve or disapprove a simple contract for the sale of ships and all assets, and yet a similar contract coupled with an agreement not to compete, which may involve more complicated antitrust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including antitrust issues." 460 F.2d at 945.

In the *Reynolds* case the District Court held the FMC to be without jurisdiction over the Reynolds-U.S. Lines transaction, but it did so in the mistaken belief that the Reynolds-U.S. Lines transaction would *not* be an ongoing conditional acquisition.* The District Court held that Section 15 is limited to "cooperative working arrangements" and does not reach "an agreement of merger, which is essentially a single, discrete event". *United States* v. *R. J. Reynolds Tobacco Co.*, 325 F. Supp. 656, 659 (D.N.J. 1971).

Thus the FMC and the courts have consistently recognized the FMC's jurisdiction over ongoing conditional acquisitions, and Congress has reenacted Section 15 after specific notice of this exercise of jurisdiction. This well-established course of administrative construction of Section 15 is entitled to substantial deference from the courts. *E.g.*,

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* Defendants and the FMC pointed out to the District Court in *Reynolds* on rehearing that the FMC could modify the Reynolds-U.S. Lines transaction so as to make it undeniably an ongoing working arrangement, but the District Court adhered to its view that the FMC was without jurisdiction.

Volkswagenwerk A.G. v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944).

3. The Legislative History of the Shipping Act Confirms that Congress Intended to Give the FMC Jurisdiction Over Common Control of Competing Carriers.

The Shipping Act of 1916 stemmed in large part from the Alexander Report of 1914, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).* The Alexander Report makes clear that the Alexander Committee viewed common ownership of competing common carriers by water through acquisition as a principal public policy problem, especially in the domestic (intercoastal and Great Lakes) trade (Alexander Report, pp. 409-10). It described scores of examples of such common control (pp. 317-46, 369-89).** Given this deep concern with acquisitions, at least in the domestic

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* The legislative history of the enactment of Section 15 of the Shipping Act in 1916, as well as its subsequent reenactment in 1961 and other congressional action taken with notice of the FMC's assertion of jurisdiction over ongoing conditional acquisitions, is described and quoted in full in a printed Legislative History of Section 15 of the Shipping Act of 1916, dated March 1972 and prepared by Ragan & Mason. Because of its length (96 pages), copies of this Legislative History are being separately served and filed with the Clerk of the Court.

** The Alexander Committee also expressed concern over the possibility of unrestricted rate wars leading to wholesale consolidation of carriers in the foreign trade (Alexander Report, pp. 301, 416). As the FMC stated in the decision which the Ninth Circuit affirmed on the jurisdictional issue in *Matson*,

> "it is clear that the Committee and Congress recognized that it could not legislatively control totally foreign mergers any more than it could effectively legislate against rate wars. And it would seem to us, that the same considerations which led Congress to grant this Commission the power to exempt anti-competitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge." 11 F.M.C. at 58.

trade, it is inconceivable that Congress would have neglected to subject such acquisitions to regulation without expressly saying so in its report or in the debates which followed.* The erroneous statements of the court below (460 F.2d at 939) and the District Court in *Reynolds* (325 F. Supp at 659) that the Alexander Report was not concerned with acquisitions were apparently due to the failure to read Part II of the Report, dealing with the domestic trade. When it was passed in 1916, Section 15 applied to both the domestic and the foreign trade. *See* 39 Stat. 728, 733 (1916). Only in 1940 was domestic shipping transferred to the ICC by the Transportation Act of 1940 (the Wheeler-Lea Act). Thus the substantive thrust of the Alexander Report strongly supports the conclusion that, at the time of the enactment of Section 15, acquisitions of control of competing carriers were intended to fall within the FMC's jurisdiction under Section 15.

This conclusion is reinforced by the subsequent legislative history of the Transportation Act of 1940. Under that Act, the jurisdiction over domestic common carriers by water which had been given to the FMC by the Shipping Act was transferred to the ICC, and domestic carriers were made subject to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), which explicitly confers upon the ICC jurisdiction over mergers and consolidations. 54 Stat. 905 (1940), as amended, 49 U.S.C. § 5(13). It is inconceivable that such a change of substance, if this were a change, would not be discussed in the legislative history. Yet

* Congress could hardly have believed that the antitrust laws would render such regulation unnecessary. Indeed, in the one Sherman Act action brought against a domestic water carrier consolidation, which the Alexander Report mentioned with approval (pp. 340-41), a decree of dissolution was *denied* in 1914. *United States* v. *Great Lakes Towing Co.*, 217 F. 656 (N.D. Ohio 1914).

nothing in the voluminous Congressional debates and reports accompanying the passage of the Transportation Act of 1940 suggests that Congress thought that it was conferring upon the ICC a jurisdiction over mergers and consolidations which the FMC had not possessed, or that it was for the first time exempting such agreements from the antitrust laws. *See, e.g.*, S. Rep. No. 433, 76th Cong., 1st Sess. 28-32 (1939); H.R. Rep. No. 1217, 76th Cong., 1st Sess. 12 (1939).

4. The Structure and Aims of the Shipping Act Confirm the FMC's Jurisdiction Over Ongoing Conditional Acquisitions.

Fundamental public policy considerations reinforce the plain meaning of Section 15 in demonstrating the FMC's jurisdiction over acquisitions of ongoing entities. This Court has repeatedly stressed that the basic aim of the Shipping Act of 1916 was to place ocean shipping under the regulatory jurisdiction of an expert administrative body. *E.g., Far East Conf.* v. *United States*, 342 U.S. 570, 573-76 (1952); *United States Nav. Co., Inc.* v. *Cunard S.S. Co., Ltd.*, 284 U.S. 474, 485 (1932). Nowhere is such expertise more vital than in weighing the public interest implications of mergers and acquisitions. As Judge Merrill wrote in *Matson Nav. Co.* v. *FMC*, 405 F.2d 796, 800 (9th Cir. 1968),

> "The direct and destructive impact upon competition which may result from a merger renders it the kind of arrangement as to which expert scrutiny most clearly is to be desired. On the other hand, to leave enforcement of antitrust policy in such cases to the FTC, the Department of Justice and the courts would apply the full and unconditional force of the antitrust laws to such agreements

> contrary to the intent of the Shipping Act that industry considerations must be taken into balance in judging industry arrangements."

The FMC is peculiarly well fitted to deal with ongoing conditional acquisitions because it can maintain constant regulatory surveillance of the ongoing relationship between the parties, and because Section 15 expressly authorizes the FMC to cancel or modify an agreement even though it has previously approved it (*see* p. 4 *supra*). The FMC's preliminary order in the Reynolds-U.S. Lines transaction makes clear the extent of the regulatory jurisdiction which the FMC can and will exercise over such a continuing relationship. Among other things, the order contemplates that the Board of Directors of U.S. Lines shall have one "public member" (5a); that all common agents and facilities, charters, and service rationalization agreements between Sea-Land and U.S. Lines must be specifically approved by the FMC (6a); and that the FMC's approval of the transaction will be subject to continuing review (4a). Such continuing regulatory control of all aspects of the ongoing relationship between two common carriers by water is closely analogous to the continuing jurisdiction of the Civil Aeronautics Board over the acquisition of control of an air carrier, which this Court recently reaffirmed in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131, 4136-39 (U.S. Jan. 10, 1973). Such ongoing regulatory surveillance in the public interest would be impractical for a court to duplicate under the antitrust laws. Thus the basic public policies underlying the Shipping Act of 1916 strongly affirm the conclusion that Congress intended to give the FMC regulatory jurisdiction over continuing acquisitions.

CONCLUSION

For the reasons given above, the Court need not reach in the present case the question of the jurisdiction of the Federal Maritime Commission over acquisitions which, unlike that involved in the present case, create an ongoing relationship between the parties requiring continuing FMC supervision. If this question is reached in the present case, R. J. Reynolds Tobacco Company respectfully submits that it should be answered in the affirmative.

Dated: New York, New York
January 25, 1973

Respectfully submitted,

LAWRENCE E. WALSH
Attorney for Amicus Curiae
1 Chase Manhattan Plaza
New York, New York 10005
212 422-3400

WILLIAM F. RAGAN
GUY MILLER STRUVE
Of Counsel

APPENDIX

Order of the Federal Maritime Commission Reopening Proceeding for Limited Purposes

FEDERAL MARITIME COMMISSION

Docket No. 70-51

AGREEMENT OF MERGER NO. 9827-1 AMONG R. J. REYNOLDS TOBACCO COMPANY, RJI CORPORATION, SEA-LAND SERVICE, INC. AND WALTER KIDDE & COMPANY, INC., UNITED STATES LINES, INC.

ORDER REOPENING PROCEEDING FOR LIMITED PURPOSES

The Commission[1] is prepared to approve the acquisition by R. J. Reynolds Tobacco Company (Reynolds) of all the outstanding common stock of United States Lines, Inc. (USL) held by Kidde subject to conditions which assure the maintenance of U.S.L. as a viable independent corporation with Reynolds providing financial assistance to maintain U.S.L. as such a corporation.

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[1] Commissioner Day holds that the Commission is without jurisdiction over the Agreement under consideration but since four members of the Commission vote affirmatively on that issue he would join Commissioners Hearn and Morse in issuing this Order.

Chairman Bentley and Vice-Chairman Barrett vote against the issuance of this Order.

We are disposed to make this determination to help create continued substantial American-flag participation in international maritime competition. Our approach is with a view toward maintaining USL as a strong independent U.S.-flag carrier, and precluding its dismemberment. The latter possibility is very real under the intent of the Supplemental Agreement as indicated by its terms; and to permit such an eventuality would be a disservice to the American merchant marine and a severe detriment to the public interest in a strong and competitive American merchant fleet.

Under the current and developing structure of international ocean commerce, there is a great need to assure the continued operation of efficient and productive U.S.-flag carriage in all major trades. Consequently, our inclination to approve the acquisition would not result in an approval of the type of corporate consolidation wherein one company survives and the other does not. Our desire is rather to ensure the survival of existing American-flag service by permitting the infusion of new and private capital into our merchant marine fleet. What we envision here are two independent companies to be operated under a continuing Sec. 15 agreement.

As a result we envision stronger U.S.-flag competition in international maritime markets; vigorous competition for United States military and government controlled cargo; and FMC access to carrier data used in arriving at rates for government cargo.

On the strength of the conditions to approval set forth below and others which may be suggested, the Commission will be able to assure the above benefits, and we will be

able also to prevent any restraint of trade without need or justification; to assure our continuing surveillance and review of Reynolds/Sea-Land and USL activities through receipt of periodic reports; and to retain a practicable option to dissolve the acquisition upon breach of any conditions attached to the acquisition.

We reject a negativist approach to the issues in this case and we will make every effort not only to forestall impediments to the competitive effectiveness of our merchant marine but we will take positive action to improve the competitive thrust of our merchant fleet.

As to those conditions that we would impose to obtain the desired result, we fully appreciate that it is not possible to crystalize these conceptual limitations without the customary benefit of assistance from all parties. We deem it desirable to obtain the assistance and comments of all parties in order to establish appropriate conditions without reconciling the various contentions of all parties to this proceeding. Accordingly, we are reopening the proceeding for this limited purpose.

Additionally, we are neither oblivious of nor insensitive to the argument made that we lack jurisdiction to modify the Agreement under consideration to the extent proposed. However, we think it more appropriate to treat that principle of law in our Report following this limited reopening. Our immediate objective is to secure the views of all parties on the conditions listed below, including any others which may be suggested concurrently by the parties in their opening memoranda filed in response to this Order prior to the issuance of our Report and Order.

Order of the Federal Maritime Commission Reopening Proceeding for Limited Purposes

THEREFORE IT IS ORDERED, That pursuant to sections 15, 21 and 22 of the Shipping Act, 1916, the proceeding shall be reopened for the limited purpose of the submission of memoranda and replies and oral argument if requested or considered necessary by the Commission, directed to the following proposed conditions including those submitted by the parties themselves:

I. The stock of U.S.L. is to be transferred to RJI to be held by RJI to insure the independence of U.S.L.

A. There shall be no substitution for RJI as the owner of the U.S.L. stock without FMC approval.

B. The existing corporate relationship among Reynolds, RJI and U.S.L. shall be irrevocable except as may be ordered by the FMC.

C. This approval shall be subject to constant surveillance and to review by the Commission at least every 5 years.

D. Reynolds/RJI shall, by agreement, consent that the FMC may require them to divest themselves of U.S.L. stock upon order of the FMC for breach of any condition herein.

E. RJI shall not sell or otherwise dispose of, or encumber by lien, mortgage, or otherwise, the assets of U.S.L. except upon approval of the FMC.

F. No scheme may be adopted by U.S.L., RJI, or Reynolds which would result in the dissipation of the assets or revenues of U.S.L., except that reasonable dividends on U.S.L. stock may be paid so as not to exceed net profits of U.S.L. for the prior corporate fiscal year, based upon sound

accounting principles and after adequate provision for debt servicing.

II. All expenses, debts, and financing of U.S.L. operations shall be assumed by RJI under guarantee of Reynolds.

A. No loans or advances of funds by Reynolds to U.S.L. or to RJI for the benefit of U.S.L. may be secured by the assets or revenues of U.S.L., or by U.S.L. voting stock or other evidence of voting interest in U.S.L., except as may be approved by the FMC.

III. U.S.L. is to be operated by RJI as an independent carrier in all respects in full competition with Sea-Land.

A. U.S.L. and Sea-Land shall not have any common employees, officers, or directors.

1. One director of U.S.L. shall be a "public member": a person experienced in maritime transportation and corporate finance, and he shall be appointed by the Chief Judge of the U. S. Court of Appeals for the District of Columbia.

B. U.S.L. and Sea-Land shall establish and maintain separate bids and tariffs for the carriage of military or other United States Government-controlled or generated cargo.

C. U.S.L. shall maintain membership in its own name in conferences, pools, and other agreements approved by the FMC or hereafter filed for approval except as otherwise authorized by the FMC.

D. U.S.L. and Sea-Land may have common soliciting or husbanding agents, brokers, forwarders, stevedores, attorneys, accountants, or terminal facilities, but only to the extent authorized by the FMC.

E. U.S.L. and Sea-Land shall not share in any pool percentages except as authorized by the FMC.

F. U.S.L. and Sea-Land shall not enter into any ship sale, ship charter, space charter, equipment interchange, transshipment, or any similar type of arrangement, or any type of service rationalization arrangement with each other without FMC approval.

IV. U.S.L. and Sea-Land shall submit to the FMC, in form as prescribed by the FMC, semiannual reports verified by the president and the treasurer or secretary of such corporations with respect to the adherence to all the conditions contained herein.

A. The FMC shall have access to all records of U.S.L. RJI, Reynolds, and Sea-Land with respect to the maintenance of these conditions, particularly, but not limited to, Item III.B.

V. Any party or any person having an interest in the subject matter may at any time petition the FMC for modification of any of these conditions, and jurisdiction shall be retained by the FMC to amend, modify, or cancel these conditions in part or in whole pursuant to such petition or on the Commission's own motion.

VI. As used in these conditions, Sea-Land, Reynolds, RJI, and U.S.L. mean all subsidiary, parent, successor, or other organizations or corporations similarly or otherwise affiliated with Sea-Land, Reynolds, RJI, and U.S.L.

IT IS FURTHER ORDERED, That the memoranda shall be filed by any party on or before July 6, 1972. Replies thereto shall be filed by any party on or before July 26, 1972.

IT IS FURTHER ORDERED, That U.S.L. is to file with this Commission (with copies to all parties) the following financial data:

1. For the year 1971 and for the first three months of 1972, a certified and detailed Balance Sheet and Income (Profit and Loss) Statement, accompanied by appropriate footnotes.
2. These submissions shall bear the certification by the corporate officer responsible for the maintenance of the books, accounts, and financial records of the Company, stating that the books and accounts have been maintained in accordance with an appropriate system of accounts, that the submissions have been prepared from the books of the Company, and that they accurately report those books and accounts.

This data is to be filed at the Office of the Secretary, Federal Maritime Commission, 1405 I Street, N.W., Washington, D. C. 20573, on or before the close of business on July 6, 1972.

FRANCIS C. HURNEY
Secretary

(SEAL)

[Served June 7, 1972]

Federal Maritime Commission
News Release 72-19

FEDERAL MARITIME COMMISSION
Washington, D.C. 20573

FOR IMMEDIATE RELEASE—SEPTEMBER 28, 1972

FMC ACTS IN "MERGER"

By reaffirming its original three-to-two vote, the Federal Maritime Commission today approved, subject to conditions, the acquisition of United States Lines Company by R. J. Reynolds Company.

Under the action, the three assenting Commissioners further restricted the operation of U. S. Lines by Reynolds as a completely separate entity.

U. S. Lines and Sea-Land are the two largest operators of American flag containerships. Under the FMC ruling, the two will be maintained as independent competing American flag steamship lines. U. S. Lines, currently a subsidiary of Walter J. Kidde Company, will function under R. J. Industries, a holding company subsidiary of the Reynolds interests.

The FMC majority opinion repeated its requirement that the two companies be operated competitively and added that they shall operate only ships built and/or converted in the United States under the American flag, manned by American seamen, and discontinue any foreign flag operation within two years. Any foreign flag chartering may be done only with prior FMC approval.

The three commissioners voting approval are George H. Hearn, vice chairman, Clarence Morse and James V. Day. Commissioner Day held that the Commission is without

jurisdiction over the Agreement under consideration but since the majority of the Commission voted affirmatively on that issue he joined Commissioners Hearn and Morse in this action.

Chairman Helen Delich Bentley and Commissioner Ashton C. Barrett reiterated their opposition to the merger or acquisition.

The original order issued June 7, 1972, called for the further action which was announced today. The commission report will follow.

Federal Maritime Commission
News Release 72-20

FEDERAL MARITIME COMMISSION
Washington, D.C. 20573

FOR IMMEDIATE RELEASE, FRIDAY,
SEPTEMBER 29, 1972

F.M.C. CLARIFIES "MERGER" RULING

In response to inquiries with respect to News Release No. 72-19, of September 28, 1972, dealing with the acquisition of United States Lines Company by R. J. Reynolds Company (Docket No. 70-51), the majority will require:

1. The eight SL-7 ships built or being built abroad by Sea-Land be forthwith registered under U. S. flag and U. S. manned.
2. Subsequent shipbuilding or conversions by or for either company be done in U. S. yards.
3. Existing foreign-flag operations by either company be discontinued within two years.
4. Chartering of foreign-flag vessels by either company be done only with prior Federal Maritime Commission approval.

U. S. Lines and Sea-Land are the two largest operators of American-flag containerships. Under the F.M.C. ruling, the two will be maintained as independent competing American-flag steamship lines. U.S. Lines, currently a subsidiary of Walter J. Kidde Company, will function under R. J. Industries, a holding company subsidiary of the Reynolds interests.

Section 15 of the Shipping Act of 1916 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall

Section 15 of the Shipping Act of 1916, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814

continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve

a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however*, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel or modify each such agreement in accordance with the provisions of this section.